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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ERIC STILLER and JOSEPH MORO,  
12 on behalf of themselves individually  
13 and all other similarly situated,

14 Plaintiffs,

15 v.

16 COSTCO WHOLESALE  
17 CORPORATION and DOES 1 through  
18 25, inclusive,

19 Defendants.  
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Case No. 3:09-cv-2473-GPC-BGS

**ORDER DENYING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE  
FIFTH AMENDED COMPLAINT  
AND TO MODIFY CLASS  
DEFINITION**

**(ECF NO. 160)**

21 In this collective and class-action case, plaintiffs Eric Stiller (“Stiller”) and  
22 Joseph Moro (“Moro”) (together, “Plaintiffs”) allege defendant Costco Wholesale  
23 Corporation (“Costco”) has violated federal and state labor laws through the  
24 implementation of closing procedures that result in unpaid off-the-clock (“OTC”) time.  
25 (ECF No. 96-1, 4th Amend. Compl. (“4AC”).)

26 Before the Court is Plaintiffs’ Motion for Leave to File Fifth Amended  
27 Complaint and to Modify Class Definition (“Motion for Leave to File 5AC”). (ECF  
28 No. 160.) Costco has filed a response in opposition. (ECF No. 166.) Plaintiffs have  
filed a reply. (ECF No. 169.)

On December 13, 2010, Judge Huff certified an opt-out class of California

1 hourly employees under Federal Rule of Civil Procedure 23(b)(3) (“California Class”)  
2 and conditionally certified a nationwide opt-in collective action under the Fair Labor  
3 Standards Act (“FLSA”). (ECF No. 13.)

4 Plaintiffs’ initial Complaint and each subsequent amended complaint, up until  
5 Plaintiffs’ Third Amended Complaint, defined the California Class as encompassing  
6 all hourly, non-exempt, union or non-union employees employed in Costco warehouses  
7 in California. (ECF Nos. 1, 34, 72.)

8 On October 4, 2010, Costco filed a motion for partial summary judgment, in  
9 which it argued that the “union exemption” found in California Labor Code § 514  
10 prevented class members represented by unions from recovering overtime pay under  
11 state law. (ECF No. 78.) On November 3, 2010, Judge Huff granted Costco’s request  
12 for summary judgment on these grounds. (ECF No. 92 at 13-14.)

13 On October 28, 2010—prior to Judge Huff’s November 3, 2010  
14 Order—Plaintiffs filed a motion for leave to file a fourth amended complaint (“Motion  
15 for Leave to File 4AC”). (ECF No. 90.) In their Motion for Leave to File 4AC,  
16 Plaintiffs represented that, after considering Costco’s request for summary judgment  
17 regarding California Labor Code § 514, Plaintiffs wished to “**clarify** that the members  
18 of the proposed California Class are, *inter alia*, **non-union members.**” (ECF No. 90-1  
19 at 3 (emphases in original).) Judge Huff, already having ruled that union members  
20 belonging to the California Class were not eligible to receive overtime pay, granted  
21 Plaintiffs’ unopposed Motion for Leave to File 4AC on November 10, 2010. (ECF No.  
22 94.) Plaintiffs’ filed their 4AC on November 16, 2010. (ECF No. 96.) The California  
23 Class was, and continues to be, defined as “all persons who worked for Costco  
24 Wholesale Corporation in California as hourly, non-exempt, non-union employees who  
25 were subject to Costco’s lockdown procedures . . . .” (See 4AC ¶ 24.) On December  
26 13, 2012, Judge Huff certified this newly defined California Class. (ECF No. 104.)

27 On March 11, 2011, Costco sent notice and opt-out forms to 32,139 persons  
28 identified as members of the California Class. During the summer and fall of 2011, the

1 parties proceeded with discovery, during which both California union and non-union  
 2 employees were deposed. On November 29, 2011, Costco produced records pertaining  
 3 to members of the California Class that contained data for both union and non-union  
 4 employees. Plaintiffs assert that, after reviewing the records and noticing that Costco  
 5 included information regarding some union employees, Plaintiffs realized they had  
 6 mistakenly excluded from the California Class union employees eligible to receive  
 7 straight time. Approximately four months later, on April 4, 2012, Plaintiff filed the  
 8 instant Motion for Leave to File 5AC. (ECF No. 160.)

### 9 **I. Legal Standard**

10 Although neither party raises the issue, the Court observes that the deadline to  
 11 file a motion to amend pleadings passed on March 5, 2010, and was never extended.  
 12 (See ECF No. 18.)

13 Ordinarily, Federal Rule of Civil Procedure 16(b)(4)'s good cause standard  
 14 governs the modification of a Rule 16 scheduling order, which includes the deadline  
 15 to seek leave to amend pleadings. This good-cause standard comports with Rule  
 16 6(b)(1), which provides: "When an act may or must be done within a specified time,  
 17 the court may, for good cause, extend time . . . ." Rule 6, however, provides more  
 18 specificity regarding the timing of a request to extend a deadline.

19 Rule 6 provides that, if a motion to extend is made after a deadline has expired,  
 20 the motion to extend may only be granted "if the party failed to act because of  
 21 excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). Thus, if a party wishes to seek leave  
 22 to amend its pleadings after the deadline to do so has passed, the party must  
 23 demonstrate both good cause for modifying the scheduling order, in addition to  
 24 demonstrating excusable neglect for having missed the deadline. See O'Banion v.  
 25 Select Portfolio Servs., Inc., 2011 U.S. Dist. Lexis 133116, at \* 13-15 (D. Idaho Nov.  
 26 16, 2011) (applying Rules 6 and 16 to motion for leave to file amended complaint that  
 27 was filed after deadline to file such a motion had passed); Weil v. Carecore Nat'l, LLC,  
 28 2011 WL 1938196, at \*2 (D. Colo. May 19, 2011) (observing that other courts "have

1 held that a party moving to amend a pleading after a scheduling order deadline has  
 2 passed must support the motion by demonstrating both excusable neglect and good  
 3 cause”); see also Yeoman v. Ikea U.S.A. West, Inc., 2013 U.S. Dist. Lexis 96270, at  
 4 \*11-14 (S.D. Cal. July 10, 2013) (applying Rules 6 and 16 to motion for leave to  
 5 extend discovery deadlines after deadlines passed).

6 In Pioneer Investment Services Co. v. Brunswick Associates Limited  
 7 Partnership, 507 U.S. 380, 395 (1993), the United States Supreme Court established  
 8 a four-part balancing test for determining whether there has been “excusable neglect.”  
 9 Although that case involved Federal Rule of Bankruptcy Procedure 9006(b)(1), the  
 10 Court reviewed the various contexts in which the phrase appears in the Federal Rules  
 11 of Civil Procedure and made clear that the test applies in all of those contexts. Id. at  
 12 395. The factors include: (1) the danger of prejudice to the non-moving party, (2) the  
 13 length of delay and its potential impact on judicial proceedings, (3) the reason for the  
 14 delay, including whether it was within the reasonable control of the movant, and (4)  
 15 whether the moving party’s conduct was in good faith. Id. The Pioneer test requires  
 16 a flexible approach whereby no one factor is more significant than any other. Id. at 395  
 17 n.14. The Court cautioned against “erecting a rigid barrier against late filings  
 18 attributable in any degree to the movant’s negligence.” Id. at 395 n.14. The weighing  
 19 of the Pioneer factors is left to the discretion of the court. Pincay v. Andrews, 389 F.3d  
 20 853, 860 (9th Cir. 2004).

21 The good cause standard primarily considers the party’s diligence in seeking to  
 22 modify a scheduling order. Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609  
 23 (9th Cir. 1992). The focus of the inquiry is on the moving party’s reasons for seeking  
 24 modification; “[i]f that party was not diligent, the inquiry should end.” Id.  
 25 “[C]arelessness is not compatible with a finding of diligence and offers no reason for  
 26 a grant of relief.” Id.

## 27 **II. Analysis**

28 Plaintiffs seek leave to amend their 4AC in order to modify the definition of the

1 California Class to include both union and non-union hourly employees for purposes  
2 of recovering unpaid “straight time.”

3 While the parties did not apply the correct legal standards to Plaintiffs’ Motion  
4 for Leave to File 5AC, the Court finds that the parties have provided sufficient  
5 information and argument for the Court to construe Plaintiffs’ Motion for Leave to File  
6 5AC as also requesting an extension of the deadline to seek leave to amend pleadings.  
7 Accordingly, the Court will apply the Pioneer factors to determine whether Plaintiffs’  
8 failure to abide by the scheduling order is a result of excusable neglect.

9 **A. Danger of Prejudice to the Non-moving Party**

10 Costco argues it would be unduly prejudiced by a late amendment because  
11 Costco would be forced to expend thousands of dollars to notify new class members,  
12 conduct an additional deposition, and produce more records. Costco contends the  
13 production of additional records would require an additional twelve to eighteen hours  
14 of work and that Costco would have to send notice to an additional 16,689 union  
15 employees.

16 Plaintiffs assert Costco has already sent out notice to some union employees and  
17 produced records for some union employees. Plaintiffs argue leave to amend would  
18 prevent undue prejudice to themselves and promote judicial economy because failure  
19 to grant leave to amend would likely necessitate a second trial, which would involve  
20 major duplication of efforts by both parties.

21 The Court finds that, while Costco might suffer some inconvenience as a result  
22 of Plaintiffs’ mistake, the inconvenience is slight in comparison to the possibility of  
23 another trial. Beery v. Hitachi Home Elecs., 157 F.R.D. 481, 484-85 (C.D. Cal. 1994).  
24 Still, this factor requires the Court to consider the prejudice to the non-moving  
25 party—not the moving party.

26 The Court finds Costco would suffer some prejudice by Plaintiffs’ untimely  
27 request for leave to amend in that Costco would be required to spend an additional  
28 twelve to eighteen hours producing additional documents, deposing at least one union

1 employee, and sending notice to over 16,000 new class members. This would, of  
2 course, require the Court to re-open discovery at this late stage in the proceedings. The  
3 Court thus finds that this factors weights against a finding of excusable neglect.

4 **B. Length of Delay and Potential Impact on Judicial Proceedings**

5 Plaintiffs filed their Motion for Leave to File 5AC more than two years after the  
6 deadline to seek leave to amend pleadings passed, (see ECF No. 18), almost two years  
7 after they filed their 4AC, (see ECF No. 90), and three months after the close of  
8 discovery, (see ECF No. 142). This is a substantial delay. The impact of this delay is  
9 that the Court would be required to re-open limited discovery at a late stage in the  
10 proceedings. While this is not a significant impact on the judicial proceedings, the  
11 Court finds the length of delay weighs against a finding of excusable neglect.

12 **C. The Reason for Delay**

13 Plaintiffs assert the reason for their delay is that they mistakenly removed all  
14 union members from the California Class in their attempt to defeat Costco's October  
15 4, 2010 Motion for Summary Judgement with respect to California Labor Code § 514.  
16 Plaintiffs assert they realized their mistake on March 21, 2012, after receiving  
17 explanation codes to differentiate union from non-union employees in records  
18 produced by Costco. Plaintiffs state that they noticed Costco had sent notice to some  
19 union employees, along with the notice sent to non-union employees, which led  
20 Plaintiffs to realize they had mistakenly omitted all union employees from the  
21 California Class instead of just union employees seeking overtime compensation.  
22 Plaintiffs then filed the instant Motion for Leave to File 5AC more than five weeks  
23 after this discovery.

24 Costco argues Plaintiffs' Motion for Leave to File 5AC demonstrates undue  
25 delay by Plaintiffs because Plaintiffs have already amended their operative pleading  
26 four times, and the proposed amendment is not based on any new facts or discovery of  
27 new evidence. Costco asserts Plaintiffs knew union members were not included in the  
28 California Class definition during the period from January 3, 2011, to February 18,

2011, which is when the parties exchanged proposed Rule 23 class notices, reviewed one another's proposed notices, and agreed on an amended notice. (ECF Nos. 105-2; 109-3; 112-3.)

The Court finds that, even accepting Plaintiffs' representation that they mistakenly omitted union employees from the class definition, Plaintiffs had the information necessary to correct their mistake but failed to do so in a timely manner. Instead, Plaintiffs waited two years after making the mistake, three months after the close of discovery, and more than five weeks after they apparently discovered their mistake before attempting to rectify it by filing the instant Motion for Leave to File 5AC. Accordingly, this factor weighs against a finding of excusable neglect.

#### **D. Whether the Moving Party's Conduct Was in Good Faith**


The final factor is whether Plaintiffs acted in good faith. The Court finds there is no evidence of bad faith by the Plaintiffs. This factor is therefore neutral.

Weighing the foregoing factors together, the Court finds Plaintiffs' failure to abide by the deadline to seek leave to amend its 4AC is not the result of excusable neglect. Accordingly, the Court must deny Plaintiffs' Motion for Leave to File 5AC.

### **CONCLUSION & ORDER**

Having considered the parties' submissions, the record in this matter, and the applicable law, and for the foregoing reasons, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Leave to File 5AC, (ECF No. 160), is **DENIED**. The hearing on Plaintiffs' Motion for Leave to File 5AC, currently set for September 27, 2013, is **VACATED**. Remaining on calendar is the hearing on Costco's Motion to Decertify.

DATED: September 26, 2013

  
HON. GONZALO P. CURIEL  
United States District Judge